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ABDUL WAHDI ZAKARIA

v.

PUSPAKOM SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
AZIAH ALI JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: W-02(IM)(NCVC)-332-02-2013]

C

25 FEBRUARY 2014

CIVIL PROCEDURE: *Striking out - Application for - Whether at any stage of proceedings - Whether delay in application - Application filed three months after statement of defence filed - Subsequent amendment to*

D

statement of claim after close of pleadings - Whether there was undue delay in filing of application - Whether claim frivolous, vexatious or abuse of process of court - Rules of the High Court 1980, O. 18 r. 19(1)

LIMITATION: *Striking out action on ground of time bar - Action*

E

commenced out of time - Cause of action in tort - Whether accrued when damages suffered - Date of discovery of damage - Whether relevant - Whether exceptions applicable - Limitation Act 1953, s. 29

The appellant/plaintiff's car was damaged in an accident and classified as 'total loss' by the owner, Oriental Capital Assurance

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Bhd. The plaintiff repaired the car and sent it to the respondent/ defendant for the purpose of inspection in order to enable the car to be registered in the plaintiff's name. The inspection resulted in a report dated 5 December 2005 ('the first report') in which the defendant stated that there was tampering with the 'cowl panel'

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of the chassis number and was detained by the Road Transport Department ('RTD'). After a series of inspections, a report was issued stating that the welding marks at the chassis number panel were due to repair works carried out on the car. Subsequently, the defendant issued a 'Laporan Pemeriksaan Khas' ('the second

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report') confirming that the car was approved for registration. Pursuant thereto, the change of ownership was effected and the car was returned to the plaintiff. The plaintiff, dissatisfied with the detention and loss of use of the car, filed a claim for general damages for negligence against ten defendants, including RTD and

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the defendant ('first SOC'). However, the plaintiff subsequently withdrew his claim against the nine other defendants. The plaintiff prayed for, *inter alia*, a declaration that the first report by the

defendant was wrong and invalid. The defendant filed a statement of defence and thereafter, filed an application under O. 18 r. 19(1)(a), (b) and/or (d) of the Rules of the High Court 1980 ('RHC') to strike out the first SOC on the ground of limitation under the Limitation Act 1953 ('the Act'). In opposing the defendant's application, the plaintiff relied on the grounds, *inter alia*: (i) failure by the defendant to plead the defence of limitation in its statement of defence; (ii) delay by the defendant in filing the application; and (iii) mistake in the defendant's first report was discovered only on 16 March 2010 and pursuant to s. 29(c) of the Act, time for the purpose of limitation only starts to run from the date of discovery of the mistake. The High Court allowed the defendant's application for striking out. Hence, this appeal by the plaintiff.

Held (dismissing appeal with costs)
Per Aziah Ali JCA delivering the judgment of the court:

(1) An application under O. 18 r. 19(1) of the RHC could be made at any stage of the proceedings. The appeal record showed that the defendant's application was filed approximately three months after the statement of defence was filed whereas the order allowing the plaintiff to amend the statement of claim was dated 29 August 2012, when the pleadings had been closed. In the circumstances of the case, the plaintiff's complaint had no merit as there was no undue delay by the defendant in filing the application. (para 16)

(2) There was no averment of any mistake in the first SOC or the amended statement of claim. The defendant had valid grounds for failing the car during the inspection since the cowl panel of the chassis number had been tampered with. This was further supported by the chemist's specific report. Therefore, there was no mistake in the defendant's first report. (para 18)

(3) A cause of action founded in tort accrues when the appellant suffers damage and limitation runs from the date on which a cause of action accrues regardless of whether the plaintiff discovers the damage. Hence, s. 29 of the Act would not be available to the plaintiff. (para 18)

(4) Where the defence relied on is an absolute defence, the court may strike out the claim even in the absence of a statement of defence (*Tasja Sdn Bhd v. Golden Approach Sdn Bhd,* dist). In such cases, where the defence merely alleged that the statement of claim discloses no reasonable cause of action,

such an objection on the ground of limitation can prevail. In the present case, the objection taken by the plaintiff was because limitation was not specifically pleaded in the statement of defence. The averments made in the statement of defence showed that notice had been given to the plaintiff that the defendant intends to show that the plaintiff's claim must fail for being frivolous and vexatious or an abuse of the process of the court. The plaintiff ought not to be taken by surprise when the defence was then followed by the application to strike out. It was up to the plaintiff to show that his claim was not statute-barred and ought not to be struck out. (paras 22 & 23)

(5) Section 6(1)(a) bars the bringing of an action founded on tort after the expiration of six years from the date on which the cause of action accrued. The plaintiff's cause of action accrued on 5 December 2005 and the statement of claim was filed on 23 May 2012. It was clear that limitation had set in. Thus, there was nothing before the court to suggest that the plaintiff could bring himself within the exceptions set out in the Act. (para 24)

Bahasa Malaysia *Translation Of Headnotes*

Motokar perayu/plaintif telah mengalami kerosakan dalam satu kemalangan dan diklasifikasikan sebagai 'total loss' oleh pemiliknya, Oriental Capital Assurance Bhd. Plaintif membaiki motokar tersebut dan menghantarnya kepada responden/defendan bagi tujuan pemeriksaan supaya motokar tersebut boleh didaftarkan atas nama plaintif. Selepas pemeriksaan, satu laporan bertarikh 5 Disember 2005 ('laporan pertama') dikeluarkan di mana defendan menyatakan bahawa terdapat pengusikan kepada nombor casis 'panel kowl' dan seterusnya telah ditahan oleh Jabatan Pengangkutan Jalan ('JPJ'). Selepas menjalankan satu siri pemeriksaan, satu laporan dikeluarkan menyatakan bahawa kesan pengimpalan pada panel nombor casis adalah disebabkan oleh kerja-kerja membaiki motokar tersebut. Kemudian, defendan mengeluarkan 'Laporan Pemeriksaan Khas' ('laporan kedua') mengesahkan bahawa motokar tersebut diluluskan untuk pendaftaran. Berikutan itu, penukaran pemilikan dilakukan dan motokar tersebut dipulangkan kepada plaintif. Plaintif, tidak berpuashati dengan penahanan dan kehilangan penggunaan motokar tersebut, memfailkan tuntutan untuk ganti rugi am bagi kecuaian terhadap sepuluh defendan, termasuk JPJ dan defendan ('tuntutan pertama'). Walau bagaimanapun, plaintif

kemudian menarik balik tuntutannya terhadap sembilan defendan yang lain. Plaintif memohon, antara lain, satu deklarasi bahawa laporan pertama oleh defendan adalah salah dan tidak sah. Defendan memfailkan pernyataan pembelaan dan selepas itu, memfailkan permohonan di bawah A. 18 k. 19(1)(a), (b) dan/atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk membatalkan tuntutan pertama atas alasan had masa di bawah Akta Had Masa 1953 ('Akta'). Dalam membantah permohonan defendan, plaintif bersandar kepada alasan-alasan, antara lain: (i) kegagalan defendan memplidkan pembelaan had masa dalam pernyataan pembelaannya; (ii) kelewatan oleh defendan dalam memfailkan permohonan tersebut; dan (iii) kesilapan dalam laporan pertama hanya disedari pada 16 Mac 2010 dan menurut s. 29(c) Akta, masa bagi tujuan had masa hanya bermula pada tarikh kesilapan tersebut disedari. Mahkamah Tinggi membenarkan permohonan defendan untuk pembatalan. Dengan itu, rayuan ini oleh plaintif.

Diputuskan (menolak rayuan dengan kos)
Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Suatu permohonan di bawah A. 18 k. 19(1) KMT boleh dilakukan pada mana-mana peringkat prosiding. Rekod rayuan menunjukkan bahawa permohonan defendan difailkan lebih kurang tiga bulan selepas pernyataan pembelaan difailkan manakala perintah membenarkan plaintif meminda penyata tuntutan adalah bertarikh 29 Ogos 2012, apabila pliding telah ditutup. Dalam keadaan kes ini, aduan plaintif tidak bermerit kerana tidak ada kelewatan yang tidak wajar oleh defendan dalam memfailkan permohonan tersebut.

(2) Tidak ada penyataan mengenai kesilapan dalam tuntutan pertama atau penyata tuntutan terpinda. Defendan mempunyai alasan yang sah bagi menggagalkan motokar tersebut semasa pemeriksaan disebabkan terdapat pengusikan kepada nombor casis panel kowl. Ini disokong selanjutnya oleh laporan spesifik ahli kimia. Oleh itu, tidak ada kesilapan dalam laporan pertama defendan.

(3) Kausa tindakan yang diasaskan kepada tort bermula apabila perayu mengalami kerugian dan had masa bermula dari tarikh apabila kausa tindakan bermula tanpa mengira sama ada plaintif menyedari kerugian tersebut. Oleh itu, s. 29 Akta tidak terpakai kepada plaintif.

(4) Apabila pembelaan yang disandarkan adalah pembelaan mutlak, mahkamah boleh membatalkan tuntutan tersebut walaupun tanpa pernyataan tuntutan (*Tasja Sdn Bhd v. Golden Approach Sdn Bhd,* dibezakan). Dalam kes sedemikian, apabila pembelaan hanya menyatakan bahawa penyata tuntutan tidak mendedahkan kausa tindakan yang munasabah, bantahan sedemikian atas alasan had masa adalah mengatasi. Dalam kes ini, bantahan yang dibuat oleh plaintif adalah kerana had masa tidak diplidkan secara spesifik dalam pernyataan pembelaan. Pernyataan dalam pernyataan pembelaan menunjukkan bahawa notis telah diberikan kepada plaintif bahawa defendan berniat untuk menunjukkan bahawa tuntutan plaintif harus gagal kerana remeh, menyusahkan atau satu penyalahgunaan proses mahkamah. Plaintif tidak sepatutnya terkejut apabila pembelaan kemudiannya diikuti dengan permohonan untuk pembatalan. Ia terpulang kepada plaintif untuk menunjukkan bahawa tuntutannya tidak dihadkan oleh masa dan tidak wajar dibatalkan.

(5) Seksyen 6(1)(a) menghalang pengemukaan tindakan yang berasaskan tort selepas tamat enam tahun dari tarikh apabila kausa tindakan bermula. Kausa tindakan plaintif bermula pada 5 Disember 2005 dan penyata tuntutan difailkan pada 23 Mei 2012. Adalah jelas bahawa had masa telah bermula. Oleh itu, tidak terdapat apa-apa di hadapan mahkamah untuk menyarankan bahawa plaintif boleh menggunakan pengecualian yang dinyatakan dalam Akta.

Case(s) referred to:

AmBank (M) Bhd v. Abdul Aziz Hassan & Ors [2010] 7 CLJ 663 CA ***(refd)***
Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1) [1984] 1 CLJ 353; [1984] 1 CLJ Rep 251 FC ***(refd)***
Riches v. Director of Public Prosecutions [1973] 2 All ER 935 ***(refd)***
Tasja Sdn Bhd v. Golden Approach Sdn Bhd [2011] 3 CLJ 751 FC ***(dist)***
Trengganu Forest Products Sdn Bhd v. Cosco Container Lines & Anor [2007] 5 CLJ 720 HC ***(refd)***

Legislation referred to:

Limitation Act 1953, ss. 4, 6(1)(a), 29(c)
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d)

For the appellant - Nor Razmi Che Hat; M/s John Yong & Irene Song
For the respondent - Firdaus Husni; M/s Chooi & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 21-NCVC-103-05-2012]

Reported by S Barathi

JUDGMENT

Aziah Ali JCA:

Introduction

[1] On 10 December 2012 the High Court allowed the application filed by the respondent to strike out the appellant's claim under O. 18 r. 19(1) of the Rules of the High Court 1980 on the ground of limitation (encl. 29). Being dissatisfied with the decision the appellant appeals to this court. We dismissed the appeal with costs. We now give our reasons below. For the purpose of this judgment we reproduce the salient background facts. The parties will be referred to as they were in the court below.

Salient Background Facts

[2] The plaintiff had bought a Proton Wira motorcar bearing registration number WKE4018 the front of which had been damaged in an accident. At the material time the owner of the said motorcar was Oriental Capital Assurance Berhad ("owner"). The owner had classified the motorcar as 'total loss'. The plaintiff repaired the motorcar and then sent it to the defendant for the purpose of inspection in order to enable the motorcar to be registered in the plaintiff's name. This inspection resulted in a report dated 5 December 2005 ("the 1st report") in which the defendant states that there is tampering with the 'cowl panel' of the chassis number.

[3] The said motorcar was then detained by the Road Transport Department ("RTD") as a result of which the plaintiff could not effect the transfer of ownership to himself. Thereafter a series of inspections were carried out. A joint inspection of the motorcar by the car manufacturer Proton, the RTD and the defendant was carried out. On 12 June 2009 Proton issued a report which states that welding marks at the chassis number panel were due to repair works carried out on the motorcar. On 16 March 2010 the defendant issued a 'Laporan Pemeriksaan Khas' ("the 2nd report") confirming that the motorcar was approved for registration. The change of ownership was effected on 22 March 2010. The car which had been detained by the RTD was returned to the plaintiff. The plaintiff is dissatisfied with the detention and loss of use of the motorcar and on 17 May 2012 filed his claim against ten defendants, including the RTD and the defendant herein,

claiming general damages amounting to RM253,061.97 for negligence (pp. 2-21 appeal record). In the statement of claim the defendant is named as the tenth defendant.

[4] In the statement of claim dated 17 May 2012 ("the 1st statement of claim") the plaintiff claims that the detention of the car by the first to the ninth defendants was without reasonable grounds and that the first to the ninth defendants jointly and severally have failed to justify the detention of the car for five years. The plaintiff further claims that the detention of the car was contrary to the Road Transport Act 1987 and was therefore wrongful and has caused him to suffer losses. As against the defendant/tenth defendant specifically, the plaintiff avers that he has suffered losses as a result of the negligence of the defendant and/or its agents and/or its workers and pleaded the particulars of negligence against the defendant/tenth defendant as follows (p. 18 appeal record):

(a) gagal untuk menjalankan pemeriksaan dan analisis yang tepat ke atas kenderaan tersebut;

(b) gagal untuk menggunakan kepakaran yang ada dalam menjalankan pemeriksaan ke atas kenderaan tersebut;

(c) gagal untuk menyediakan laporan pemeriksaan yang tepat dan betul;

(d) secara cuai dan/atau salah mengeluarkan laporan pemeriksaan yang tidak tepat dan/atau salah;

(e) secara cuai dalam menjalankan tugas untuk menyediakan laporan pemeriksaan yang tepat kepada orang awam dan jabatan kerajaan.

The plaintiff prayed for *inter alia* a declaration that the report made by the defendant dated 5 December 2005 is wrong and invalid.

Defence

[5] The defendant filed its statement of defence dated 26 June 2012 (pp. 31-35 appeal record). The defendant denies the plaintiff's claim and *vide* para. 25 of the statement of defence the defendant further pleaded as follows (p. 39 appeal record):

25. The 10th Defendant states that this Defence is filed without prejudice to any application to immediately strike out this action pursuant to Order 18 Rule 19 of the Rules of the High Court 1980.

[6] On 27 September 2012 ie, approximately three months after the statement of defence was filed, the defendant filed the application encl. 29 under O. 18 r. 19(1)(a), (b) and/or (d) of the Rules of the High Court 1980 ("the Rules") to strike out the first writ and statement of claim dated 17 May 2012 on the ground of limitation under the Limitation Act 1953 ("the Act").

[7] Thereafter by order of court dated 29 August 2012 the plaintiff amended the statement of claim ("the amended statement of claim"). In the amended statement of claim the plaintiff withdrew his claim against the first nine defendants leaving the defendant as the sole defendant (pp. 55-69 appeal record). The appeal record shows that the amended statement of claim was filed on 11 October 2012. The appeal record does not show that any amended defence has been filed.

The Application

[8] In the application the defendant relies on the following grounds:

(a) Bahawa kausa tindakan terhadap Defendan Ke-10 adalah berdasarkan pemeriksaan kenderaan pertama ke atas Proton Wira bernombor pendaftaran WKE4018 yang dilakukan pada 5.12.2005;

(b) Bahawa Plaintiff hanya memfailkan tindakan ini pada 17.5.2012;

(c) Bahawa Plaintif oleh itu telah dihalang oleh had masa sepertimana yang diperuntukkan statut untuk memfailkan dan meneruskan tuntutan ini terhadap Defendan Ke-10;

(d) Bahawa berdasarkan alasan-alasan yang sebagaimana yang telah dinyatakan di atas, Writ Saman dan Penyata Tuntutan Plaintif bertarikh 17.5.2012 tidak menzahirkan apa-apa kausa tindakan yang munasabah; dan

(e) Bahawa berdasarkan alasan-alasan tersebut di atas dan lain-lain Afidavit Sokongan Mohammed Shukor bin Ismail yang difailkan di sini, tindakan ini sekiranya diteruskan akan menjadi remeh, menyusahkan, dan merupakan penyalahgunaan proses Mahkamah yang Mulia ini.

[9] In the affidavit in support of the application the defendant avers as follows (pp. 79-80 appeal record):

4. Saya menyatakan bahawa intipati utama tuntutan Plaintif terhadap Defendan Ke-10 adalah bahawa Defendan Ke-10 telah cuai dan/atau gagal dalam menjalankan pemeriksaan dan

A mengeluarkan laporan pemeriksaan pada 5.12.2005 ke atas kenderaan Proton Wira bernombor pendaftaran WKE4018 ("kenderaan tersebut").

5. Sebagai lanjutan, saya menyatakan bahawa kesemua dakwaan Plaintif terhadap Defendan Ke-10 adalah berasaskan
B pemeriksaan kenderaan yang dilakukan pada 5.12.2005 ke atas kenderaan tersebut.

6. Saya dinasihatkan oleh peguamcara Defendan Ke-10 dan sesungguhnya percaya bahawa tuntutan Plaintif yang difailkan di sini telah melebihi had masa yang diperuntukkan oleh Akta
C Had Masa 1953 iaitu selama 6 tahun daripada kausa tindakan terakru.

7. Selanjutnya, saya dinasihatkan oleh peguamcara Defendan Ke-10 dan sesungguhnya percaya bahawa oleh itu, tindakan Plaintif yang difailkan di sini tidak boleh diteruskan kerana
D telah dihalang oleh had masa sepertimana yang diperuntukkan undang-undang.

[10] In opposing the defendant's application the plaintiff relies on the following grounds:

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(a) failure by the defendant to plead the defence of limitation in its statement of defence contrary to s. 4 of the Act;

(b) delay by the defendant in filing the application,

F (c) mistake in the defendant's 1st report was discovered only on 16 March 2010 and pursuant to s. 29(c) of the Act time for the purpose of limitation only starts to run from the date of discovery of the mistake.

G **Decision Of The High Court**

[11] On the first issue the learned judge considered s. 4 of the Act which states as follows:

4. Limitation not to operate as a bar unless specially pleaded

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Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

I In His Lordship's considered view an applicant need not file both a defence pleading limitation and an affidavit pleading the same. Such application has either to be supported by an affidavit

pleading the Act or, the defence of limitation has been pleaded in the statement of defence. In the present case His Lordship found that the respondent has pleaded the defence under s. 6 of the Act in para. 6 of the affidavit in support of the application. His Lordship concluded that limitation starts to run from the date of the 1st report ie, 5 December 2005 and since the claim was filed only on 17 May 2012 the plaintiff's claim discloses no reasonable cause of action and on the face of it is obviously unsustainable and is rendered frivolous, vexatious, scandalous and an abuse of process. The application was therefore allowed with costs and the plaintiff's claim was struck off.

[12] On the issue of delay His Lordship disagreed that there was delay by the defendant in filing the application. On the issue of mistake His Lordship found that s. 29(c) of the Act does not apply as there is no mistake in the defendant's 1st report because the cowl panel of the motorcar's chassis number had been tampered with and the defendant's 2nd report does not mean that the defendant had made a mistake in their inspection of the car.

The Appeal

[13] Before us learned counsel for the plaintiff Encik Nor Razmi relies on the authority of *Tasja Sdn Bhd v. Golden Approach Sdn Bhd* [2011] 3 CLJ 751 and submits that the learned judge has erred in failing to consider the distinction between absolute limitation and limitation based on the Act. Relying on the said authority it is submitted that a defence under the Act is not absolute and in such a case, the defence must be pleaded in the statement of defence. The defendant's failure to plead limitation is therefore not in compliance with s. 4 of the Act. Further learned counsel submits that there was delay in filing the application because pleadings had been closed on 2 July 2012 and the court had set down the case for trial. On the issue of mistake it is submitted that the defendant did not challenge the two inspections conducted on the motorcar and the defendant has issued two inconsistent reports. The detention of the car by the RTD which caused losses to the plaintiff was pursuant to the defendant's 1st report. Thus the plaintiff has prayed for declarations that the defendant's 1st report is wrong and invalid as this report is inconsistent with the defendant's 2nd report.

[14] Learned counsel for the defendant Encik Firdaus on the other hand submits that the failure to expressly plead limitation in the statement of defence is not fatal in a striking out application because in paras. 5 and 6 of the affidavit in support of the application the defendant has clearly stated limitation and the Act as one of the grounds to support its application. It is further submitted that the plaintiff could not be said to be taken wholly by surprise by the application because in para. 25 of the statement of defence the defendant has averred that the defence is filed without prejudice to any application to strike out the suit under O. 18 r. 19 of the RHC 1980. It is submitted that the plaintiff therefore has had sufficient notice and ample opportunity to argue why limitation does not apply. Learned counsel submits that on the plaintiff's pleaded case the damage caused and loss allegedly suffered came into existence on 5 December 2005 because the plaintiff has sought for damages for loss of use of the motorcar commencing from 5 December 2005 to 22 March 2010. Therefore the cause of action as pleaded accrues on 5 December 2005 and not 16 March 2010 as contended by the plaintiff.

[15] On the issue of delay learned counsel submits that O. 18 r. 19(1) states that "the court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, ...". Therefore it is submitted that there is no specific time within which an application should be filed. In support learned counsel cites the case of *Trengganu Forest Products Sdn Bhd v. Cosco Container Lines & Anor* [2007] 5 CLJ 720; [2007] 5 MLJ 486. In that case the court found that O. 18 r. 19 does not indicate any mandatory requirement that a striking out application must be undertaken within a specific time although such application must be made as soon as possible and, the court will not refrain from striking out a statement of claim even after commencement of trial because otherwise the court will waste its time and resources on a plea that is bound to fail. With regard to s. 29(c) of the Act learned counsel submits that mistake has not been pleaded in the statement of claim. Learned counsel submits that for the purpose of calculating the statutory limitation period, the date of discovery of the purported damage is immaterial to the date of accrual of the cause of action (*AmBank (M) Bhd v. Abdul Aziz Hassan & Ors* [2010] 7 CLJ 663; [2010] 3 MLJ 784).

Decision

[16] We propose to deal with the issues of delay and s. 29(c) of the Act first. On the issue of delay we have noted earlier that the appeal record shows that the defendant's application was filed approximately three months after the statement of defence was filed. Further we note from the record of appeal at p. 55 that the order allowing the plaintiff to amend the statement of claim is dated 29 August 2012, well after 2 July 2012 when pleadings had been closed. An application under O. 18 r. 19(1) could be made at any stage of the proceedings. Having considered the circumstances of this case, we are of the view that the plaintiff's complaint has no merit. We do not find that there is undue delay by the defendant in filing the application.

[17] On the issue of mistake, the plaintiff states the mistake was discovered on 16 March 2010 and therefore s. 29(c) of the Act applies. Learned counsel for the defendant submits that mistake has not been pleaded in the statement of claim. In the case of *Messrs Yong & Co v. Wee Hood Teck Development Corp Ltd (1)* [1984] 1 CLJ 353; [1984] 1 CLJ Rep 251 the claim was for loss of money lent, and damages. The appellants were the solicitors for the respondents. The respondents pleaded concealed fraud against the appellants in the statement of claim but without particulars. The particulars were given in the amended reply. Syed Agil Barakbah FJ said *inter alia* as follows:

> Further it was contended the allegation of concealed fraud is not properly pleaded and not particularised in the statement of claim but only in the amended reply (p. 30 of the record). In this regard we refer to *Halsbury's Laws of England* 4th edn. vol. 28 p. 295 para. 655 which says that *where concealed fraud or mistake is relied upon as postponing the limitation period, it must be sufficiently alleged in the pleading to bring the case within the appropriate statutory provision*. (emphasis added)

[18] We agree with learned counsel for the defendant that there is no averment of any mistake in the first statement of claim or, for that matter, even in the amended statement of claim. The mistake alleged by the plaintiff against the defendant, if any, is clearly in relation to the 1st report dated 5 December 2005. We agree with the learned judge that there is no mistake because the defendant had valid grounds for failing the motorcar during inspection since the cowl panel of the chassis number had been tampered with. We find that while the defendant merely states

"terdapat penukaran pada bahagian "cowl panel" nombor casis Kenderaan tersebut.", the report by the ninth defendant, the chemist, is specific that there are welding marks surrounding the chassis number and "the portion of metal piece carrying the original chassis number had been cut away and a piece of foreign metal bearing chassis number PL1C96LNR2B767968 welded in its place is not the original number to the car." The chemist report thus supports the defendant's 1st report. On the facts as pleaded in the statement of claim we agree with the learned judge that there is no mistake in the defendant's 1st report. We find that not only is mistake not pleaded in the statement of claim but s. 29 of the Act would not be available to the plaintiff in any event. We agree with learned counsel for the defendant that a cause of action founded in tort accrues when the appellant suffers damage and limitation runs from the date on which a cause of action accrues regardless of whether the plaintiff discovers the damage (*AmBank (M) Bhd v. Abdul Aziz Bin Hassan & Ors., supra*).

[19] We now come to the issue of limitation. The primary objection raised by the plaintiff against the defendant's application to strike out is the failure of the defendant to plead limitation in the statement of defence which counsel for the plaintiff submits is contrary to s. 4 of the Act and O. 18 r. 8(1) of the Rules.

[20] In *Tasja Sdn Bhd v. Golden Approach Sdn Bhd (supra)* cited by the plaintiff's learned counsel, the plaintiff's claim therein was premised on a contract. After the plaintiff's statement of claim was served on the defendant, the defendant did not file a statement of defence but filed a summons-in-chambers to strike out the plaintiff's statement of claim under O. 18 r. 19(1)(b), (c) or (d) on the ground that the plaintiff's claim was statute barred under s. 6(1)(a) of the Act. In opposing the application, the plaintiff contended that the defendant was not entitled to claim limitation since the defendant has not filed its defence pleading limitation as required by s. 4 of the Act. The Deputy Registrar allowed the defendant's application and struck out the plaintiff's claim. On appeal to the judge-in-chambers, the learned judge dismissed the plaintiff's appeal and held that the plaintiff's claim was time barred. In the Court of Appeal, the plaintiff submitted amongst others that the defendant had failed to plead a defence of limitation as no defence had been filed, thus there was non-compliance with s. 4 of the Act. The Court of Appeal held that s. 4 was not relevant for the purpose of the defendant's application as the defendant was applying to strike out the plaintiff's claim under

O. 18 r. 19 and as such the defendant did not have to file its defence at that stage. Thus both the High Court and the Court of Appeal ruled that in an application for striking out based on limitation under the Act it is not necessary to first file a defence pleading limitation under the Act. The plaintiff then obtained leave to appeal to the Federal Court.

[21] One of the questions posed to the Federal Court was as follows:

> whether a defence of limitation under s. 4 of the Limitation Act 1953 must be pleaded before a claim can be dismissed on the ground that it is time-barred.

At the Federal Court learned counsel for the plaintiff raised a distinction between a limitation that is conditional and one which is absolute. It was submitted that in the Public Authorities Protection Act 1948 ("PAPA") and the Civil Law Act 1956 ("CLA") the respective limitation periods stated therein are absolute and therefore it is reasonable in an application where limitation that is absolute is relied upon as a ground for striking out, to waive this plea but not in a claim for limitation under the Limitation Act which is not absolute. The Federal Court agreed and held that in cases where the application to strike out is based on absolute limitation such as under the CLA or the PAPA, an application to strike out should be granted without having to plead such a defence because limitation has set in and there is no room for doubt as to when limitation begins to run. However, where the defence is based on limitation under the Act, an application for striking out should not be allowed until and unless limitation is pleaded based on the explicit words in s.4 of the Act and because the defence of limitation under the Act is not absolute as there are exceptions provided in the Act as well as the option for the defendant to waive this defence. To allow a defendant's application to strike out the plaintiff's case even before such events have occurred and deprive the plaintiff of an opportunity to explain why limitation does not apply would cause injustice to the plaintiff. In his judgment James Foong FCJ said *inter alia* as follows:

> ... we agree with the submission of the plaintiff that in an application for striking out under O. 18 r. 19(1) RHC on the ground of limitation to bring an action, a distinction must be made as to which provision of the law is used to ground such application. If it is based on s. 2(a) of PAPA or s. 7(5) of the

A Civil Law Act, where the period of limitation is absolute then in a clear and obvious case such application should be granted without having to plead such a defence. However, in a situation where limitation is not absolute, like in a case under the Limitation Act, such application for striking out should not be allowed until and unless limitation is pleaded as required under s. 4 of the Limitation Act.

[22] It is pertinent to note that unlike the present case, *Tasja* is a case where the application to strike out was made after service of the statement of claim and before any defence was filed. Therefore the plaintiff had no prior notice that the defendant would raise the defence of limitation until the application to strike out the claim was filed. It was in the context of that scenario that the issue of absolute and conditional limitation was raised and dealt with by the Federal Court. The case of *Tasja* is authority that where the defence relied on is an absolute defence, the court may strike out the claim even in the absence of a statement of defence. Further, it appears from the judgment of Davies LJ in *Riches v. Director of Public Prosecutions* [1973] 2 All ER 935 that was referred to by James Foong FCJ in his judgment that, in such cases, where the defence merely alleged that the statement of claim discloses no reasonable cause of action, such an objection on the ground of limitation can prevail. Davies LJ said as follows:

> I do not want to state definitely that, in a case *where it is merely alleged that the statement of claim discloses no cause of action, the limitation objection should or could prevail. In principle, I cannot see why not.* If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called on to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the statute of limitations and must fail. (emphasis added)

[23] In the present case the objection taken by the appellant is because limitation is not specifically pleaded in the statement of defence notwithstanding para. 25 of the statement of defence and the reasons given by the defendant in the application and in the affidavit in support. The averments made in the statement of defence and in particular in para. 25 shows that notice has been given to the plaintiff that the defendant intends to show that the plaintiff's claim must fail for being frivolous and vexatious or an

abuse of the process of the court. We agree with learned counsel for the defendant that the plaintiff ought not to be taken by surprise when the defence was then followed by the application to strike out. It is up to the plaintiff to show that his claim is not statute-barred and ought not to be struck out.

[24] Section 6(1)(a) bars the bringing of an action founded on tort after the expiration of six years from the date on which the cause of action accrued. On the uncontested facts we find that the plaintiff's cause of action accrued on 5 December 2005. The plaintiff filed his statement of claim dated 17 May 2012 on 23 May 2012 (p. 7 appeal record). It is clear that limitation has set in and there is nothing before the court to suggest that the plaintiff can bring himself within the exceptions set out in the Act. For the reasons stated we dismissed the appeal with costs.